No. 10273.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH DI MARZO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Statment of the Case.

On July 1, 1942, an indictment, No. 15500, was filed charging the appellant with violation of the Mann Act [R. 30]. Appellant *was arraigned on July 29, 1942,* pleading not guilty [R. 32], whereupon the cause was continued to July 30, 1942, for setting. On July 30, 1942, the District Court ordered that motions objecting to the jurisdiction of the court be made in writing and filed by August 4, 1942 [R. 33]. Such objections were filed [R. 33] but it should be noted that they do not include the sole point relied upon by appellant in this appeal. The objections were overruled on August 8, 1942 [R. 42] and the cause set for trial on September 9, 1942.

The *point relied upon by appellant was raised for the first time* when the cause came on for trial *on September*

9th, when an objection to the jurisdiction of the court was interposed on the ground that the Grand Jury was composed entirely of men and did not conform to the provisions of Section 411 of Title 28 U. S. C. A. [R. 82].

Appellant has abandoned all other assignments of error.

It is appellee's position that appellant cannot succeed in this appeal because:

1. He is barred by his failure to attack the regularity of the indictment within the statutory period allowed.
2. He is barred by his failure to show any resulting prejudice from the alleged irregularity in the selection of the Grand Jury.
3. The provisions of the California Statutes on the inclusion of women jurors are directory, not mandatory, and hence the selection of the Grand Jury was in full conformance with the requirements of Section 411, Title 28, U. S. C. A.

I.

Appellant Is Barred by His Failure to Attack the Regularity of the Indictment Within the Statutory Period Allowed.

U. S. C. A. Title 18, Section 556a, provides:

> "No plea to abate nor motion to quash any indictment upon the ground of irregularity in the drawing or impaneling of the grand jury or upon the ground of disqualification of a grand juror shall be sustained or granted unless such plea or motion shall have been filed before, or within ten days after, the defendant filing such plea or motion is presented for arraignment. * * *"

Since appellant was arraigned on July 29, 1942 [R. 32] and the point was first raised in open court on September 9, 1942 [R. 82], he has considerably exceeded the ten day limitation within which such a motion might be made. The language of the court in *State v. Collins* (D. C. Tex.), 10 Fed. Supp. 1007, 1009, in discussing Section 556a is pertinent:

> "The recent act by the Congress, approved April 30, 1934, shows the trend, not only of legislation, but the best thought at the present time with reference to technicalities of the sort under consideration."

Section 556a was enacted in 1934, but it is apparent from reading various cases before that date that the courts have always placed importance on the time element. In *Wolfson v. United States* (C. C. A. 5), 101 Fed. 430, a motion to quash was denied because filed more than two months after return of the indictment. And in *United States v. Louisville & N. R. Co.* (D. C. Kan.), 177 Fed. 780, 785, a delay of 35 days after service of process was held sufficient to waive any objections to the competency of the Grand Jury. In *Agnew v. United States,* 165 U. S. 44, 17 S. Ct. 238, 41 L. Ed. 624, it is held that the defendant must take the first opportunity in his power to make the objection.

Appellee maintains that appellant's objection as to the Grand Jury is barred not only by the statutory limitation, but under the previous decisions, in his failure to formally raise the point in his "Objections to the Jurisdiction of the Court," filed on August 7, 1942 [R. 33].

II.

Appellant's Failure to Show Prejudice Arising Out of the Alleged Defect in the Indictment Is Fatal to a Motion to Quash.

Appellant's objection to the return of the indictment by a grand jury from which women were excluded did not contend that the rights of appellant were in any way jeopardized or prejudiced thereby. In fact, an examination of the record shows reliance by appellant upon technical grounds only, and an express negation of any knowledge of an existing bias or prejudice.

> "The Court: Your motion is on purely technical grounds, or on the ground that some prejudice resulted to your client?
>
> Mr. Lavine: On technical grounds.
>
> The Court: You are claiming no actual bias or prejudice to your client by virtue of the fact that it was a jury of men?
>
> Mr. Lavine: I don't know whether it was biased or prejudiced.
>
> The Court: I am speaking now of actual prejudice to your client by virtue of there being men instead of women. Do you think your client would have had, in other words, would have had a fairer hearing before a grand jury, or greater consideration by a grand jury which had been selected in accordance with the usage and customs in a state court, or had there been women on the grand jury?
>
> Mr. Lavine: I don't know whether or how to pass on that, that is something we cannot prognosticate, the degree of fairness, but my objection is based on non-compliance of the statute." [R. 83.]

It is the statutory rule that such an objection in matter of form only will not be sustained.

U. S. C. A. Title 18, Section 556:

> "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. * * *"

In *United States v. American Medical Ass'n.*, D. C., D. C. 1939, 26 Fed. Supp. 429, it has been held that a court's power to go back of an indictment to inquire concerning irregularities is sparingly used and *justified only where a clear and positive showing is made of gross and prejudicial irregularity.* An allegation was made by defense counsel upon information and belief that certain irrelevant testimony was given to the Grand Jury and that government counsel requested and persuaded it to return the indictment. A motion was made for approval by the court for defense counsel to elicit from the former Grand Jury information as to the proceedings before it so that a motion to quash the indictment might be made. It would appear that appellant's counsel in the present case, in his failure to assert prejudice, is in the same position as the defense in the case under discussion as will be shown from the following excerpt from the decision (page 431):

> "(Defendants) * * * admit a pleading to abate or quash must be certain and definite in its allega-

tions of prejudicial facts. They assert as a reason for asking an investigation by the court that they are unable to make the requisite averments and oath. Thus we have the novel situation of defendants admitting that they are in no position to file the essential pleading to justify the court in making an inquiry, yet nevertheless asking that the inquiry be ordered anyway, in the expectation or hope that material will turn up to support a proper plea. Manifestly the court ought not grant such a motion. It is lacking in every essential of a plea in abatement or motion to quash. Its allegations, made only on information and belief, are vague and uncertain—mere statments of conclusions, wholly lacking in factual details. The effect of granting such a motion would be to break down all legal checks against technical, dilatory tactics. The strong presumption of the regularity of grand jury proceedings would no longer prevail."

As to the general rule that defendant cannot complain of, nor take exception to, irregularities which do not act to his prjudice, we respectfully refer to:

Agnew v. United States, 165 U. S. 36, 17 S. Ct. 234, 41 L. Ed. 624 (627);

United States v. Cobban (C. C. Mont.), 127 Fed. 713 (715);

United States v. Ewan (C. C. Fla.), 40 Fed. 451.

The motion to quash must specifically set out the injury, according to the decision in *State v. Collins* (D. C.

Tex.), 10 Fed. Supp. 1007 (1009), citing as supporting authority, in addition to the *Agnew* case (*supra*), the following:

Lowdon v. United States (C. C. A. 5), 149 Fed. 673, 674;

Wilder v. United States (C. C. A. 4), 143 Fed. 433, 439;

United States v. Nevin (D. C. Colo.), 199 Fed. 831, 833;

Hillman v. United States (C. C. A. 9), 192 Fed. 264, cert. den.;

Breese v. United States, 226 U. S. 1, 33 S. Ct. 1, 57 L. Ed. 97, 102;

Ard v. United States (C. C. A. 5), 54 F. (2d) 358, cert. den.;

Luxenberg v. United States (C. C. A. 4), 45 F. (2d) 497, 498, cert. den.

The following pertinent excerpt from *Wolfson v. United States* (C. C. A. 5), 101 Fed. 430, 433, covers the situation as presented by the case at issue:

> "When questions relating merely to the regularity of the organization of the grand jury are raised in time, they are not viewed with much favor. The courts would peremptorily check and punish an effort to corruptly organize a grand jury or would prevent any injustice or unfairness in its formation; but when nothing of that kind is shown, or even alleged, the court is reluctant to grant a motion to quash the indictment on account of irregularities that work no hardship or injustice."

Appellee submits that appellant's failure to show any prejudice, bias or injustice resulting to him from the exclusion of women from the Grand Jury is an effective bar to his contention.

III.

The Provisions of the California Law for the Inclusion of Women Jurors Are Directory and Not Mandatory, and Hence Not Binding Upon the Federal Courts of the District in the Selection of a Grand Jury.

U. S. C. A., Title 28, Section 411, provides:

> "Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

Appellant's contention is that Section 204 of the Code of Civil Procedure of the State of California requires the inclusion of women on juries within the state and hence within the United States courts. However, it was directly held in *People v. Parman,* 1939, 14 Cal. (2d) 17, 92 Pac. (2d) 387, 388, by the California Supreme Court that the provisions of Section 204 are directory and not mandatory.

The general rule in California is well stated in the following language from *People v. Shannon,* 203 Cal. 139, 263 Pac. 522, 523:

> "* * * there is nothing in the State or Federal Constitutions, or in any statute, which guarantees

> one accused of a crime a trial by a jury composed of men and women, or of only men, or of only women, or of any definite proportion of either sex. His right is to a fair and impartial jury, and not to a jury composed of any particular individuals. People v. Durrant, 116 Cal. 179, 199, 48 Pac. 75. He cannot complain if he is tried by an impartial jury and can demand nothing more."

The situation covering the exclusion of women from Federal Grand Juries in this District is covered by a decision of Judge Yankwich in the case of *United States v. Ballard* (D. C. Cal.), 35 Fed. Supp. 105, 1 F. R. D. 483, in which the ruling was adverse to appellant's contention.

Appellant has relied upon the decision in *Glasser v. United States,* 315 U. S. 60, 86 L. Ed. 680 (696). The point is not directly ruled on, however, in the *Glasser* case. There, two Acts of the State of Illinois, then recently passed, required state jury lists to contain the names of women. The court held *only* that in view of the short time elapsing between the effective date of the Illinois Acts and the summoning of the Grand Jury, *it was not error to omit the names of women* from Federal jury lists.

To contend that the *Glasser* case supports appellant's position in the case at bar, is to draw an inference therefrom which cannot be supported by the facts or the ruling. It was not necessary in the *Glasser* case for the court to interpret the Illinois Acts as making it mandatory to include women on the jury list. In California a direct ruling has been made that Section 204 of the Code of Civil Procedure is directory only and not mandatory.

People v. Parman, supra.

The cardinal principle determining the legality of the selection is that, excepting illegal discrimination on racial grounds, the guarantee of due process does not prohibit the choice of jurors from one sex.

Strauder v. West Va., 100 U. S. 303, 25 L. Ed. 664.

In view of the direct holding in *People v. Parman* (*supra*) that Section 204 of the California Code of Civil Procedure is directory and not mandatory, it necessarily results that the proceedings for the selection of the Federal Grand Jury were entirely regular and in accordance with Section 411 of Title 28 of the United States Code.

Wherefore, appellee submits that the judgment and verdict of the District Court should be sustained.

Respectfully submitted,

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